A **TANG LOON PAU & ORS v. MOHD SALIHIN KOTNI & ANOR**

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
S NANTHA BALAN JCA
MOHAMED ZAINI MAZLAN JCA
B [CIVIL APPEAL NO: B-04(W)-115-03-2021]
25 JULY 2023
[2023] CLJ (JT16)

C **Abstract** – *In the context of an insurer's liability under s. 96(1) of the Road Transport Act 1987, the critical question is whether an insurer remains liable when it is proven that the insured motorcar is not involved in the alleged motor-vehicle accident. The court, in dealing with this unchartered territory, held that, if the trial court ultimately finds that the insured motor-vehicle is not involved in the alleged accident, the tort claim against the insured remains unproven and the insurer is absolved of any liability under s. 96(1).*

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E ***INSURANCE:*** *Motor insurance – Liability – Liability of insurer where insured motorcar proven not involved in accident – Judgment entered against insured and insurer – Whether insurer could challenge findings where insured did not appeal – Whether insurer has statutory and constitutional rights to intervene and appeal against liability – Whether insurer entitled to challenge findings on involvement of motor-vehicle in accident – Road Transport Act 1987, s. 96(1)*

F This was an appeal by the first plaintiff ('P1') and all the dependants of the deceased ('plaintiffs') against the decision of the High Court Judge ('HCJ') allowing the appeal by Pacific & Orient Insurance Co, the second defendant ('D2'), against the decision of the Sessions Court Judge ('SCJ') finding that the first defendant ('D1') and D2 were 100% liable for the claim in negligence in respect of a motor-vehicle accident involving a motorcycle and
G a motorcar. P1 was the rider of the motorcycle with the deceased riding pillion. Initially, the suit was only against D1 as the sole defendant. However, D2 intervened and was added as a co-defendant. At the Sessions Court, at the close of the plaintiffs' case, D2 took the position that based on the testimony of the plaintiffs' witnesses and the evidence before the court,
H the plaintiffs had failed to prove their pleaded case and that the accident was caused by the motorcar colliding into P1's motorcycle. Therefore, D2 submitted that they had no case to answer and elected not to call any witnesses or tender any evidence. The SCJ held, *inter alia*, that by reason of D2 choosing to submit no case to answer, they had expressly abandoned their
I defence to the plaintiffs' claim and held that the plaintiffs had, on a balance

of probabilities, proved their case against the defendants that they were 100% liable for the alleged accident and injuries suffered by P1 and the death of his wife, the deceased. D2 appealed to the High Court, whereas, D1 did not appeal but was a party to the proceedings at the High Court. The crux of the High Court decision was that the motorcar was not involved in the alleged accident and the findings of 100% liability against the defendants was set aside. The issue for the court's determination in this appeal was, where judgment was entered against the insured and the insurer, and the insured did not appeal, whether the insurer could challenge the findings of the accident, in light of the defence filed by the insurer and the notice of appeal filed by the insurer in the High Court. The main issue in the context of the tort claim was whether the insured motor-vehicle was involved in the alleged accident.

Held (dismissing appeal with costs; affirming decision of High Court)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) Where a party does not appeal against a decision of a court of competent jurisdiction, that party is deemed to have agreed with the correctness of the court's decision. However, in the context of an insurer's liability under s. 96(1) of the Road Transport Act 1987 ('RTA'), the critical question was whether an insurer remains liable when it is proven that the insured motorcar was not involved in the impugned motor-vehicle accident. If ultimately the finding of the trial court was that the insured motor-vehicle was not involved in the alleged accident, as was found by the HCJ in this case, then the tort claim against the insured remained unproven and the insurer was absolved of any liability under s. 96(1) of the RTA. (paras 28, 29, 33 & 37)

(2) The mere fact that D1 did not appeal against the SCJ's decision was of no moment in so far as D2 was concerned as D2 had the statutory and constitutional right to intervene and thereafter to appeal against any finding of liability made against them, particularly and especially since they were the real and substantial defendant and paymaster, unlike D1 who was only a nominal defendant. On the facts, the evidence was overwhelming, and D1's failure to appeal against the SCJ's judgment on liability did not preclude D2 from attacking the SCJ's finding on the involvement of the said motorcar in the alleged accident. (paras 38 & 44)

(3) There was no reason to interfere with the findings of the HCJ. The tort claim against D1 could not stand with the consequence that D2 was exonerated from any liability under s. 96(1) of the RTA. Hence, the question posed was answered in the affirmative with the net result that, where a judgment was entered against the insured and the insurers, and the insured did not appeal but the insurer appealed, the insurer was entitled on appeal, to challenge the trial judge's findings on the accident to establish that the insured motor-vehicle was not involved in the alleged accident. (paras 45-47)

Case(s) referred to:

AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals [2022] 8 CLJ 175 FC ***(refd)***

Jiwaneswary Raman v. Etiqa General Takaful Bhd [2023] 2 MLJ 437 CA ***(refd)***

Johannes Koplan v. Aw Chen [1970] 1 LNS 42 FC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Tang Loon Pau & Ors [2021] 9 CLJ 952 HC ***(refd)***

Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 7(3)(A)

Evidence Act 1950, s. 114(g)

Road Transport Act 1987, s. 96(1), (2), (3)

For the appellants - CM Maran & Khairul Aiman Kamar Rozaman; M/s G Dorai & Co

For the 1st respondent - in person

For the 2nd respondent - Ratnam Kamalanathan, Vinod Kamalanathan, Anis Amirah & Archana Devi T; M/s Viknes Ratna & Co

[Editor's note: For the High Court judgment, please see Pacific & Orient Insurance Co Bhd v. Tang Loon Pau & Ors [2021] 9 CLJ 952 (affirmed).]

Reported by S Barathi

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This is an appeal by Tang Loon Pau (first plaintiff – "P1") and all the dependants of the late Mdm Tan Kiok Sit ("the deceased") (collectively, "the plaintiffs") against the decision of the learned judge of the High Court ("the judge") dated 13 August 2020 in allowing the appeal by Pacific & Orient Insurance Co Berhad (No. Syarikat: 12557-W) (second defendant – "D2") against the decision of the Sessions Court Judge ("SCJ") dated 17 September 2019 in Klang Session Court Suit No. BL-A53KJ-199-05/2018 ("Suit 199") which held that Mohd Salihin bin Kotni ("Dl") and D2 were 100% liable for the claim in negligence in respect of a motor vehicle accident that took place at KM 59, Jalan Klang – Teluk Intan, Kuala Selangor on 2 September 2015, and which involved motorcycle No. BMB 5813 ("the motorcycle") and (allegedly) motorcar No. WLD 9999 ("the said motorcar").

[2] The plaintiffs' pleaded case is that the rider of the motorcycle was P1 and that the deceased was riding a pillion. Dl and D2 shall be referred to collectively as "the defendants". Whilst there is not much dispute that there was an accident involving the motorcycle, there is however an issue in regard to whether the said motorcar was in fact involved. As such, we shall refer to the said event as "the alleged accident".

[3] D1 was the registered owner of the said motorcar and D2 was the insurer of the said motorcar at the material time. The claim against the defendants was for general damages for injuries suffered by P1 as a result of the alleged accident, damages for bereavement under s. 7(3)(A) of the Civil Law Act 1956 for the second to sixth plaintiffs as the husband and children of the deceased and special damages. Initially, Suit 199 was only against D1 as the sole defendant. However, D2 intervened and was added as a co-defendant.

[4] D2's defence was that the said motorcar was not involved in the alleged accident and that there were elements of fraud in the plaintiffs' claim against D1. D2 had pleaded that D1 collaborated with the plaintiffs to put up a fraudulent claim in order to get damages, *albeit*, that the said motorcar was not involved in the accident.

[5] D1 was initially represented by solicitors who were appointed by D2. Later the solicitors were asked to discharge themselves and D1 was left unrepresented. D1 did not participate at the trial. It was only D2 which took an active part in the trial before the Sessions Court.

[6] After a full trial, the SCJ found the defendants to be 100% liable for the accident and awarded the plaintiffs general damages in the sum of RM33,750,00, bereavement in the sum of RM10,000, and special damages in the sum of RM135,287.

The Appeal To The High Court

[7] D1 did not appeal but he was a party to the proceedings in the High Court and before the Court of Appeal as well. D2 appealed to the High Court *via* notice of appeal dated 20 September 2019 which reads as "merayu kepada Mahkamah Tinggi Shah Alam terhadap keseluruhan keputusan, iaitu atas isu liabiliti dan kuantum atas alasan bahawa: defendan kedua bertanggungan cuai liabiliti sebanyak 100%, ..." The High Court allowed D2's appeal.

[8] The crux of the High Court's decision was that the said motorcar was not involved in the alleged accident. The decision of the High Court is reported as *Pacific & Orient Insurance Co Bhd v. Tang Loon Pau & Ors* [2021] 9 CLJ 952 (HC). The High Court made the following findings.

Salient Facts

[9] The salient facts showed that P1 had made police reports after the accident, stating that his motorbike was hit from the back by a motorcar that he did not know the make and registration number of the motor vehicle and that his brothers-in-law had hit him on the forehead and mouth because they alleged that he had caused the death of his wife – their sister.

[10] During the trial, P1 testified that he was given a note of the registration number of the said motorcar by a member of the public.

[11] The investigating officer, who was the plaintiffs' witness ("SP3"), testified that he had been informed by a tow-truck driver that the motorcar that had hit P1's motorcycle was "Ruzaini's car", SP3 later discovered that the motorcar mentioned by the tow-truck driver did not belong to Ruzaini but to his brother, D1. SP3 did not take a statement from D1.

[12] SP3 said that he went to the accident site and found no evidence showing the involvement of the said motorcar in the alleged accident and he did not interview anyone at the accident site. All he found at the site was a black coloured Toyota motorcar mudguard while the said motorcar was a cream/white coloured Myvi.

[13] SP3 testified that the police found that the damages to the said motorcar to be inconsistent with the damages to the motorcycle and the result of the inquest investigation was "no further action" (NFA) for the said motorcar as it was found that the said motorcar was not involved in the alleged accident with P1's motorcycle.

[14] At the close of the plaintiffs' case, D2 took the position that based on the testimony of the plaintiffs' witnesses and the evidence before the court, the plaintiffs had failed to prove on a balance of probabilities per their pleaded case that the accident took place on 2 September 2015 and that the accident was caused by the said motorcar colliding into P1's motorcycle. It was submitted for D2 that they had no case to answer and elected not to call any witnesses or tender any evidence.

[15] The SCJ agreed with the plaintiffs' submission and held that by reason of D2 choosing to submit that they had no case to answer, they had expressly abandoned their defence to the plaintiffs' claim.

[16] The SCJ also made an adverse inference under s. 114(g) of the Evidence Act 1950 against D2 for submitting that it had no case to answer and in failing to produce D1 as a witness. Therefore, the SCJ held that the plaintiffs had, on a balance of probabilities, proved their case against the defendants and that they were 100% liable for the alleged accident and for the injuries suffered by P1 and for the death of his wife, the deceased.

[17] D2 appealed against the SCJ's finding of liability (*vis-a-vis* D2).

[18] The main issues for the High Court were (i) whether the SCJ had sufficient judicial appreciation of the evidence when she concluded that the said motorcar was involved in the alleged accident; (ii) whether she had sufficient appreciation of the law when she held that the plaintiffs had discharged their burden of proof and proven on a balance of probabilities

their case against the defendants because D2 had chosen to submit that they had no case to answer at the close of the plaintiffs' case; and (iii) was the SCJ correct at law in making an adverse inference against D2 for not producing D1 as a witness.

[19] The High Court's findings (per the CLJ report) are summarised as follows:

> (1) The fact that a defendant submitted that it had no case to answer and called no witnesses and led no evidence did not absolve the plaintiff from discharging its burden of proof in law. The burden remained with the plaintiff to prove its case before a court could grant judgment on its claim. The fact that the defendant did not call any witnesses did not automatically equate to the plaintiff satisfying the burden of proof. Notwithstanding the defendant's submission of no case to answer, it still remained that the evidence adduced by the plaintiff must be sufficient to prove the plaintiffs' case. Additionally, the SCJ's drawing of adverse inference against the defendants for having elected not to call any witnesses was also wrong at law since the plaintiffs had not proven its case against the defendants on a balance of probabilities.
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> The plaintiff in an accident case must discharge his burden of proof and prove on a balance of probabilities that the accident was caused by the defendant and that the injuries and damages he suffered were a result of and/or caused by the accident, as required under s. 101 of the Evidence Act 1950. It was only after the plaintiff had discharged his burden of proof and proved his case on a balance of probabilities would the burden of proof shift onto the insurance company to prove its allegation of fraud. For all these reasons, the SCJ did not have a sufficient appreciation of the applicable law and was plainly wrong at law. (paras 33 & 36-38)
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> (2) The first plaintiff's own testimony and the documents admitted as evidence in court all showed that the accident took place on 3 September 2015. The SCJ was plainly wrong in arriving at her finding that the accident took place on 2 September 2015 based on the investigation officer's ('IO') investigation when the IO himself testified in court that 11.30pm on 2 September 2015 was not the time and date of the accident but the time and date that the first plaintiff stated in his first police report that he and his wife were riding the motorcycle from his home to Hospital Tanjung Karang. It was clearly wrong for the SCJ to conclude the date of the accident based on the IO's statement, which he had testified was based on his misreading of the first plaintiff's entry in the first police report. Additionally, it was clearly wrong for the SCJ to dismiss the first plaintiff's testimony in court and the written evidence in the medical reports exhibited in court that the accident took place on 3 September 2015 on the basis that the first plaintiff was under the influence of alcohol when he saw the medical officer (SP2) at the hospital after the accident. The basis of her rejection of the evidence was plainly wrong since the first plaintiff was not under the influence of alcohol when he told the doctor

at Klinik Anita on 1 October 2015 that the accident happened on 3 September 2015. Neither was he under the influence of alcohol when he told SP8 on 1 March 2016 that the accident happened on 3 September 2015 or when he testified in court during the trial that the accident took place on 3 September 2015.

In light of the available evidence before her, the SCJ's finding that the accident took place on 2 September 2015 was plainly wrong as it was a finding which could not be reasonably explained or justified. (paras 50-52)

(3) The first plaintiff's story, as to whether he was the rider or the pillion rider of the motorcycle at the time of the accident, kept changing. As with the date of the accident, the SCJ had brushed aside the discrepancy in evidence as to whether the first plaintiff was the rider or pillion rider. It would have been impossible for SP3 to conclude from what he found at the site of the accident as to who was the rider and who was the pillion rider as all that SP3 found was the motorcycle and the motorcycle number. SP3 was also unable to identify the exact spot where the body of the deceased was taken from as the latter was not at the location of the accident when he arrived.

It was plainly wrong of the SCJ to have made the finding that the first plaintiff was the rider and his deceased wife was the pillion rider at the time of the accident. The SCJ did not have sufficient judicial appreciation of the evidence before the court. (paras 59-62 & 65)

(4) It was indeed curious how the SCJ arrived at her conclusion that the motorcar WLD 9999 was involved in the accident with the first plaintiffs motorcycle, in the face of the evidence before the Sessions Court that the first plaintiff did not know what car had collided into his motorcycle during the accident; that there was no trace of the motorcar WLD 9999 at the site of the accident; SP3's testimony that the damage to motorcar WLD 9999 was inconsistent with the damage to the first plaintiffs motorcycle; the police findings that motorcar WLD 9999 was not involved in the accident; and the result of the inquest investigation confirmed "no further action" (NFA) was to be taken for motorcar WLD 9999 in respect of the accident. In arriving at her conclusion, the SCJ chose to ignore the oral evidence of the plaintiffs' own witnesses, the police reports filed by the first plaintiffs, the findings of the police and the result of the inquest investigation.

It was patently clear that the plaintiffs had not discharged the burden of proving its pleaded case against the defendants, (paras 77-79)

(5) *The plaintiffs had failed to prove on a balance of probabilities that the accident happened on 2 September 2015*; the first plaintiff was the rider and his deceased wife the pillion rider of his motorcycle BMB 5813; and that the motorcar WLD 9999 owned by the first defendant had collided into the back of the first plaintiff motorcycle causing the injuries, loss and damage to the first plaintiff and the death of his wife. The SCJ was thus plainly

wrong in concluding otherwise. *The SCJ erred in finding that the plaintiffs had proven its case against the defendants and for holding that the defendants were 100% liable for the accident. Accordingly, her finding of 100% liability against the defendants merited appellate intervention and should be set aside).* (paras 80-82)

(emphasis added)

Arguments, Analysis And Conclusion

[20] In the appeal before us, counsel for the plaintiffs made a valiant attempt at persuading us to interfere with the High Court's decision in terms of the evidence and the SCJ's failure to judicially appreciate the evidence. We have trawled through the evidence ourselves and saw no reason to interfere with the High Court's decision, which we think is correct in law.

[21] We agree with the judge that the SCJ was plainly wrong in concluding that the plaintiffs had proven on a balance of probabilities that the said motorcar was involved in the alleged accident.

[22] Nevertheless, it was argued for the plaintiffs that since D1 did not appeal against the SCJ's decision, the High Court cannot interfere with that part of the SCJ's finding which implicated D1 to the liability for the alleged accident. Hence, the plaintiffs argued that the judgment dated 17 September 2019 *vis-a-vis* D1 was still subsisting and therefore D2 is liable to satisfy the said judgment based on s. 96(1) of the Road Transport Act 1987 ("RTA").

[23] It was also argued for the plaintiffs that D2 can only avoid their statutory liability to satisfy the judgment sum if (i) notice under s. 96(2) of the RTA was not given, or (ii) a stay was obtained by the insurer, (iii) a declaration was obtained by the insurer under s. 96(3) of the RTA and (iv) the motor insurance policy was cancelled according to the RTA.

[24] Counsel for D2 argued that D1 is only a nominal defendant and that D2 is the substantial defendant as they are the paymaster under any judgment that is obtained against their insured provided s. 96(l) of the RTA is satisfied. Thus, whilst D1 may be nonchalant about Suit 199, D2 must nevertheless protect its legal and commercial interest.

[25] As such, they intervened and were added as a co-defendant, apparently without objection by the plaintiffs. But we do not think that it matters whether the plaintiffs objected or not. What matters is that they intervened and were added as a co-defendant.

[26] It was argued for D2 that since the High Court has found that the said motorcar was not involved in the alleged accident thus, there can be no valid judgment against Dl, *albeit* that he did not appeal.

[27] In so far as the present appeal is concerned, the issue that we have to determine is framed by the following question:

A Where Judgment (after a full trial) was entered against insured (Dl) and insurer (D2), and the insured (Dl) did not appeal,

Whether the insurer (D2) can challenge the findings of the accident, in light of the defence filed by the insurer and the Notice of Appeal filed by the insurer (D2) in the High Court.

B **[28]** We agree that the general principle that where a party does not appeal against a decision of a court of competent jurisdiction, then it is deemed that that party agrees with the correctness of the court's decision. See: *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 MLJ 461, [2012] MLJU 1167; [2013] 1 AMR 1 (FC).

C **[29]** But in the context of an insurer's liability under s. 96(l) of the RTA, the critical question is whether an insurer remains liable when it is proven that the insured motorcar was not involved in the impugned motor-vehicle accident? That is essentially the question that needs to be answered. In this regard, we are acutely conscious of the fact that we are wading into
D unchartered territory as there seems to be no case law precedent covering the point which has been raised in this appeal.

[30] The plaintiffs here maintain that so long as the insured (Dl) does not appeal against the SCJ's decision, the insurer (D2) cannot contend otherwise
E and is liable to satisfy the judgment. It was contended for the plaintiffs that D2's appeal to the High Court was only confined to their liability under s. 96(l) of the RTA.

[31] We do not agree with the stand that was taken by counsel for the plaintiffs. Clearly, the main issue in the context of the tort claim is whether
F the insured motor-vehicle was, or was not involved in the alleged accident.

[32] In this context, it is important to highlight that D2's appeal to the High Court was an appeal against the whole of the SCJ's decision *vis-a-vis* D2's liability where the SCJ found D2 together with Dl, 100% liable for the alleged accident. For completeness, we have reproduced the relevant parts
G of D2's amended memorandum of appeal dated 19 December 2019, which reads as follows:

1. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan tuntutan Responden-Responden/Plaintif-Plaintif dan memutuskan Responden Ketujuh/
H Defendan Pertama bertanggungan liability sebanyak 100%.

2. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak megambil kira kecacatan serious dalam versi yang diplidkan di dalam pliding Responden/Plaintif sebelum menentukan liabiliti.

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3. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan kenderaan Responden Ketujuh/Defendan (model Myvi putih) terlibat dalam kemalangan hanya berlandaskan keterangan lisan Pegawai Penyiasat yang bersahaja bahawa mudguard kepunyaan Toyota (warna hitam) yang dijumpai di atas jalan tidak semestinya kepunyaan kereta Toyota.

4. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira percanggahan material dalam keterangan saksi Responden-Responden/Plaintif-Plaintif sendiri berkenaan isu liability.

5. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Responden-Responden/Plaintif-Plaintif tidak membuktikan tuntutannya di atas imbangan kebarangkalian.

6. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan tuntutan Responden-Responden/Plaintif-Plaintif tanpa mengambil perakuan Responden Pertama/Plaintif Pertama ketika pemeriksaan balas.

7. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila mengambil kira fakta tidak material apabila membuat keputusan.

8. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan Responden- Responden/ Plaintif-Plaintif walaupun Responden Pertama/Plaintif Pertama tidak dapat mengingati siapa pembonceng dan penunggang pada hari kemalangan.

9. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak mengambil kira pengakuan Responden Pertama/Plaintif Pertama bahawa beliau mabuk pada hari kemalangan sehingga tidak dapat mengingati apa yang berlaku pada hari kejadian.

10. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan tuntutan Responden-Responden/Plaintif-Plaintif walaupun penglibatan kenderaan Responden Ketujuh/Defendan Pertama tidak dibuktikan.

11. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila salah tafsir dan tidak mengambil kira keterangan Pegawai Penyiasat yang mengesahkan jenis kenderaan dan komponen kenderaan yang dijumpai ditempat kemalangan tidak berkaitan dan/atau bukan sebahagian daripada motokar Responden Ketujuh/ Defendan Pertama.

12. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira keterangan dan kredibiliti Plaintif yang memberikan keterangan yang asyik bertukaran dan/atau bercanggah dengan satu sama yang lain.

A 13. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira keterangan pegawai penyiasat bahawa keputusan kes adalah NFA kerana motokar Responden/Defendan Pertama telah disahkan tidak terlibat dalam kemalangan bersama Responden-Responden/Plaintif-Plaintif.

B 14. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila salah tafsir keterangan Pegawai Penyiasat dengan mengambil kira sebahagian keterangan Pegawai Penyiasat yang berunsur andaian berbanding keterangan Pegawai Penyiasat yang berdasarkan siasatan sebenar.

C 15. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila mendapati kerosakan motosikal Responden/Plaintif selari dengan kerosakan yang didapati ke atas motokar Responden Ketujuh/Defendan Pertama walaupun bukti dokumentari dan keterangan Pegawai Penyiasat adalah bertentangan dengan penilaian yang dibuat oleh Hakim Mahkamah Sesyen.

D 16. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila langsung tidak mendapati percanggahan material dalam keterangan Responden/Plaintif mengenai kemalangan adalah lebih penting dalam penentu liabiliti berbanding keterangan dengar cakap oleh Pegawai Penyiasat.

E 17. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal mendapati elemen fraud juga boleh dibuktikan melalui keterangan yang diberikan dalam pemeriksaan balas saksi-saksi Plaintif tanpa keperluan memanggil saksi-saksi Defendan.

F 18. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila mengambil kira keterangan lisan Pegawai Penyiasat yang katanya berdasarkan '112 statement' yang 'inadmissible' dan dokumen yang hanya ditandakan sebagai IDD sahaja sebagai penentu liabiliti walaupun maklumat tersebut tidak relevan dan bercanggahan antara satu sama yang lain.

G 19. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Plaintif masih belum melepaskan beban pembuktian sebelum memindahkan beban pembuktian kepada Perayu/Defendan Kedua.

20. Hakim Mahkamah Sesyen yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membuat penilaian yang tidak menyeluruh
H terhadap kes otoriti yang dirujuk oleh Responden-Responden/Plaintif-Plaintif sebelum menentukan liabiliti dalam kes.

[33] In the present case, as a matter of fact, on appeal to the High Court, the judge made a finding that the said motorcar was not involved in the alleged accident. As far as we are concerned, we are constrained to reject the

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submission that was made on behalf of the plaintiffs that an insurer is liable to satisfy the judgment unless (i) notice under s. 96(2) of the RTA was not given, or (ii) a stay was obtained by the insurer, (iii) a declaration was obtained by the insurer under s. 96(3) of the RTA and (iv) the motor insurance policy was cancelled according to the RTA.

[34] We agree that the facts here were highly disputed and the question as to the liability of the insurer could not have been determined *via* an application for declaration under s. 96(3) of the RTA. That question, being one which touches upon liability in tort, has to be determined at a full trial. As the Federal Court had stated in *AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals* [2022] 8 CLJ 175; [2022] 5 MLJ 825 at p. 246 (CLJ); pp. [159] to [160] (MLJ):

> [159] We agree with learned counsel for the appellant that the High Court ought to have dismissed the s. 96(3) application as the first respondent relied on facts which formed the core points of dispute between the parties in the trial court, such as whether the rider of the motorcycle was involved in the accident. The question whether the rider was involved in the accident was an issue of tort and not of contract. The legislative intent behind s. 96(3) is clear, that the provision is only meant for determining issues of voidness and unenforceability of an insurance contract and cannot be exploited to determine core factual issues in the tort of negligence such as the issues of liability and damages.
>
> [160] The facts and the evidence in the present case were so highly contested, compounded as it were by the fact that the third respondent made a complete about turn in his evidence after the 10 had given evidence at the trial in the Teluk Intan Sessions Court. Surely this required determination by *viva voce* evidence in a single trial and not by two different courts as had happened in this case. These highly contested factual issues cannot suitably be resolved by way of a s. 96(3) declaration as they form a crucial point of contention between the parties.

[35] Thus in the circumstances, we do not agree that unless a declaration under s. 96(3) of the RTA is obtained, an insurer is automatically under a liability to satisfy the judgment that is obtained against the insured especially when the facts demonstrate that the plaintiffs have failed to discharge their burden of proving that said motorcar was involved in the alleged accident and was responsible for, or was at fault for the occurrence of the said incident.

[36] Thus, in a situation where the insurer has intervened and was added as a co-defendant and had successfully defended the case whether by poking holes into the plaintiffs case and/or by calling their own witnesses, and the end result is that the plaintiff is unable to prove on a balance of probabilities that the insured motor-vehicle was involved in the impugned accident, then the insurer's liability per s. 96(1) of the RTA will not arise.

[37] Indeed, this will be the case, even if for some nefarious reason, the insured decides to testify in favour of the plaintiff and goes along with the narrative that the insured motor-vehicle was involved. Thus, if ultimately the finding of the trial court is that the insured motor-vehicle was not involved, then the tort claim against the insured remains unproven and the insurer is absolved of any liability under s. 96(l) of the RTA.

[38] Thus, the mere fact that the insured (D1 in our present case) did not appeal against the SCJ's decision is of no moment in so far as the insurer (D2) is concerned as D2 has the statutory and constitutional right to intervene and thereafter to appeal against any finding of liability made against them, particularly and especially since they are the real and substantial defendant and paymaster, unlike D1 who is only a nominal defendant.

[39] The insurer's right to intervene and protect their legal and commercial interest was recently discussed by the Court of Appeal in the case of *Jiwaneswary Raman v. Etiqa General Takaful Bhd* [2023] 2 MLJ 437 (CA). The Court of Appeal emphasised that an insurer does not have to take the s. 96(3) of the RTA route and that they could intervene in the running down action especially where they intend to show that the insured motor-vehicle was not involved in the accident and that there was collusion between the insured and the third party claimant.

[40] In that case, the Court of Appeal stated that "despite the availability of the statutory remedy under s. 96(3) of the RTA to avoid liability, the (insurer) still had the right to intervene in the Magistrate's Court proceedings. The (insurer) had based its intervener application, *inter alia*, on the ground that the insured vehicle was not involved in any collision with the appellant's vehicle. In other words, the (insurer) was alleging collusion between the appellant and the alleged tortfeasor to defraud the (insurer). The (insurer) intended, after intervention, to cross-examine the witnesses and call their own witnesses to put forth its case of collusion so that all available evidence was before the Magistrate when the final decision was made on liability.

[41] In *Johannes Koplan v. Aw Chen* [1970] 1 LNS 42; [1970] 1 MLJ 220 (FC), the insured was a foreigner who had left the country and the papers could not be served on him. An order for substituted service was obtained and thereafter (interlocutory) judgment in default was obtained. Before damages could be assessed, the insurers applied to intervene and to set aside the judgment in default. The application was dismissed. The insurer appealed to the Federal Court.

[42] Before the Federal Court, the parties agreed to have the judgment set aside and for the papers to be served on the insurers and for the latter to have conduct of the defence on behalf of the insured. Although the insurers were defending their insured, they were in actual fact defending their own pockets. The Federal Court commented that:

> Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against the insured. The negligent driver is only the nominal defendant, whereas **the party injuriously affected by an award of damages is the insurer by and whose interest should be defended**.
>
> (emphasis added)

[43] Thus, in any which way that one looks at it, the insurer, as the real and substantial defendant, would be involved, either in the name of the insured, or in their own name as an intervener/co-defendant (as in the present case). In running down cases, the insured is just a nominal or notional and disinterested party.

[44] As such, the fact the insured did not appeal against the judgment on liability is of no moment and does not and cannot automatically and in every case, lead to the legal conclusion that the insurer is to be saddled with liability. There may well be cases where there may be a different legal conclusion. But on the facts of this case, the evidence is overwhelming and it is our view that the insured's (Dl's) failure to appeal against the SCJ's judgment on liability did not preclude the insurer (D2) from attacking the SCJ's finding on the involvement of the said motorcar in the alleged accident.

[45] In the result, we do not see any reason to interfere with the findings that were made by the judge of the High Court, to wit, (i) that the plaintiffs had failed to prove on a balance of probabilities that the alleged accident happened on 2 September 2015, and (ii) that the said motorcar WLD 9999 had collided into the back of P1's motorcycle causing the injuries, loss and damage to P1 and the death of his wife – the deceased. The judge went on to hold that the SCJ erred in finding that the plaintiffs had proven their case against the defendants and for holding that the defendants were 100% liable for the alleged accident. Accordingly, the High Court opined that the SCJ's finding of 100% liability against the defendants merited appellate intervention and should be set aside, (paras 80 to 82)

[46] As stated earlier, we agree with these findings by the High Court. Therefore, the tort claim against the insured (Dl) cannot stand with the consequence that the insurer (D2) is exonerated from any liability under s. 96(l) of the RTA.

[47] Hence, we answer the question which was posed to counsel in the affirmative and the net result is that where a judgment (after full trial) is entered against the insured and the insurers, and the insured does not appeal but the insurer does appeal, the insurer is entitled on appeal, to challenge the trial judge's findings on the accident to establish that the insured motor-vehicle was not involved in the alleged accident.

Outcome

[48] For the reasons as discussed above, the judgment/order of the High Court is affirmed and the plaintiffs' appeal is dismissed with costs of RM5,000 (subject to allocatur) to the second respondent (D2).